STATE OF MICHIGAN

COURT OF APPEALS

BRUCE A. HERR, SR. and ANN L. HERR, Plaintiffs-Appellees, v JOHN PASTOR and GERALDINE PASTOR, Defendants-Appellants.	UNPUBLISHED November 13, 2014 No. 318147 Monroe Circuit Court LC No. 11-031962-CH

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM.

Defendants, John Pastor and Geraldine Pastor (the Pastors), appeal as of right the trial court's judgment in favor of Bruce A. Herr, Sr. and Ann L. Herr (the Herrs), following a bench trial. The trial court found that the Pastors violated a court order requiring them to maintain a drain across their property. We affirm.

I. FACTS

A. BACKGROUND FACTS

The Herrs own property to the west of the Pastors. As a result of a fill operation by the Pastors, standing water accumulated on the Herrs' property. In 1996, Frenchtown Charter Township sued the Pastors. The parties tried the case in 1998.

The 1998 trial court found that the Pastors "slightly exceed[ed]" their fill permit. More importantly, the fill permit "was to slope dirt from an area near the house to away from the house," but instead the Pastors terraced the area. John Pastor admitted that water could not get over the Pastors' fill operation to the street drain. The trial court found that the Pastors' fill operation created a nuisance of standing water and that an underground pipe connecting to the county drain would alleviate it.

On August 12, 1998, the trial court ordered the Pastors to prepare an engineering drawing for the remedial action. On March 29, 2000, the 1998 trial court issued its final order, which provided that the Pastors had completed the improvements consistent with a sketch from the township engineer. The 2000 Order provided that the Pastors "shall maintain the improvements consistent with the sketch."

B. TRIAL TESTIMONY

The Herrs sued the Pastors on November 29, 2011. At trial, James McDevitt, the Frenchtown Township Supervisor, testified that he became aware of the drain issue in 2004, when he was elected. Herr testified that the drain became slower in 2006 and he spoke with McDevitt about it. McDevitt testified that he and the building official occasionally "would take a ride out and . . . make sure it was still draining . . . ."

Pastor admitted that he had put a solid cap on the spillway "maybe a month or two" before Herr filed the complaint. Herr testified that he discovered a cap on the pipe and asked McDevitt to look at the drain. In the spring of 2011, McDevitt inspected the drain and discovered that it was not draining. McDevitt found that the system entrance was covered with debris and water. McDevitt testified that he conversed with John Pastor, who "made a comment that he was done; he was not gonna take care of it[.]"

Mark DeLisle testified that he works for Able Sanitary Service, where he installs and repairs underground drainage lines. DeLisle inspected the drain on March 21, 2013, and found that the drain had no flow into the main drain in front of the property. DeLisle attempted to auger the drain, but there was too much dirt in it. DeLisle discovered that a "cleanout right beside Mr. Pastor's home . . . was broken from the top[.]" DeLisle believed that the dirt was getting into the pipe through the broken area. DeLisle recommended repairing the cleanout and replacing the line because heavy rains were washing soil and roots into the broken area.

Pastor testified that he and his son built the drainage line and it did not have a "cleanout." He believed that the drain was still draining because he could hear the water running in the pipes. It did not have any dirt accumulation that he knew of, and it could not clog because it is a solid pipe. Pastor also testified that the Herrs mowed their grass against their end of the drain.

Herr testified that he paid Able Sanitary $625 for the visit on May 21, 2013. Herr testified that his costs and attorney fees totaled "slightly under $9,700," not including $1,500 for Able Sanitary to repair the pipe.

C. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

The trial court found that the court order provided that the Pastors would maintain the pipe. The Pastors were "advised that there was a problem," but they "refused to have anything to do with correcting the problem[.]" Instead John Pastor "cap[ped] the spillway completely closing it." After being brought to court, John Pastor removed the cap. However, the pipe or a cleanout was broken, which caused dirt to enter the pipe and reduce its ability to drain water. Therefore, it found that the Pastors had not maintained the drain. In its June 18, 2013 order, the trial court ordered the Pastors to pay $625 to reimburse the Herrs for work performed on the drain, and $1,500 for additional necessary maintenance.

D. ATTORNEY FEES

At trial, the Herrs requested attorney fees because Pastor had capped the drain. The Herrs asserted that the Pastors' defense of the action was frivolous and that they disobeyed a court order. Counsel for the Herrs provided a detailed statement of the hours billed on the case.

The Pastors responded that their defenses were not frivolous and they had never been found in contempt.

The trial court found that John Pastor violated a court order by capping off the spillway and failing to maintain the drain. It also found that at the point when John Pastor capped the spillway, "he had no reasonable basis to believe . . . his position that he was not in violation of the court order" was true. Until he removed the cap, his defense to the action on the basis that the line was working was frivolous.

However, after John Pastor removed the cap, he had a factual basis to believe that the drain did not need maintenance, even if "he was clearly wrong." Therefore, the trial court limited the Herrs' fees to the point at which John Pastor uncapped the drain. The trial court assessed costs of $929.70 against the Pastors and attorney fees of $4235 against John Pastor.

II. WAIVER OF DEFENSES

A. STANDARD OF REVIEW

This Court reviews de novo the application of our court rules.[1]

B. LEGAL STANDARDS

MCR 2.111(F)(3) provides that a party must state their affirmative defenses in their first responsive pleading, including "a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party[.]" MCR 2.116(D)(2) provides that a party may also raise a party's lack of capacity to sue in a motion in or before the party's responsive pleading. MCL 2.111(F)(3) requires a party to "state the facts constituting . . . an affirmative defense, such as . . . statute of limitations[.]"

MCR 2.111(F)(2) provides that "[a] defense not asserted in the responsive pleading or by motion as provided by these rules is waived," unless the defense is a lack of subject matter jurisdiction. A defendant's waiver forfeits appellate review of a claimed deprivation of a right.[2]

C. APPLYING THE STANDARDS

On appeal, the Pastors contend that the trial court erred by failing to dismiss the Herrs' claims because (1) the Herrs lacked standing, and (2) two statutes of limitations, MCL 600.5805 and MCL 600.5807, barred the Herrs' claims. We disagree because we conclude that the Pastors waived these defenses by failing to timely assert them.

Here, the Pastors raised their standing defense for the first time in their response to the Herrs' motion for summary disposition under MCR 2.116(C)(9). They did not raise their

[1] *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014).

[2] *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

defense that the Herrs lacked standing in their first responsive pleading or in a motion under MCR 2.116(C)(5). Thus, the Pastors waived this defense.

And the Pastors never raised MCL 600.5805 or MCL 600.5807 before the trial court. Here, the entirety of the Pastors' affirmative defense on the statute of limitations grounds was that "[t]he period of limitations for enforcement of the Judgment, MCL [600.]5809(3), has expired." The trial court rejected this statute of limitations as a defense, and the Pastors do not raise or argue the application of MCL 600.5809 on appeal. Because the Pastors did not raise defenses under MCL 600.5805 or MCL 600.5807, they were waived.

We conclude that the trial court did not err by failing to apply these waived defenses to bar the Herrs' claims.

III. THE TRIAL COURT'S FINDINGS

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's findings of fact following a bench trial.[3] A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.[4]

B. LEGAL STANDARDS

"[I]f there is conflicting evidence, the question of credibility ordinarily should be left for the fact-finder."[5] We will not interfere with the finder of fact's determination of the weight of the evidence or the credibility of the witnesses.[6]

C. APPLYING THE STANDARDS

The Pastors contend that the Herrs did not sufficiently prove their case because there was evidence that other problems caused the drainage issue and the Herrs did not take steps to resolve those problems. We disagree.

Here, the witnesses presented conflicting evidence regarding the causes of the drain's blockage. Various witnesses testified that the drain was no longer working in 2011. DeLisle testified that the drain was blocked by dirt and debris because of a broken area in the "cleanout" near the Pastors' home. DeLisle testified that repairing the broken section would make the drain

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[3] MCR 2.613(C); *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

[4] *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

[5] *Dawe v Bar-Levav & Assoc, PC (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010).

[6] See *Id*; *Allard v State Farm Ins Co*, 271 Mich App 394, 408; 722 NW2d 268 (2006).

work correctly. In contrast, Pastor testified that the drain did not have a "cleanout" and could not get clogged with dirt. Pastor testified that the drain continued to drain.

Essentially, this case came down to the trial court's determination of which witnesses to believe. The trial court clearly rejected Pastor's assertion that Herr caused the drain to clog with grass clippings from Herr's lawn. But testimony from Herr, DeLisle, and McDevitt supported the trial court's finding that the Pastors had failed to maintain the drain and that the drain was filled with dirt and debris. Regarding the rest of Pastors' assertions, no record evidence supports these assertions. We are not definitely and firmly convinced that the trial court made a mistake.

We conclude that the trial court's finding the Pastors failed to maintain the drain was not clearly erroneous.

IV. ATTORNEY FEES

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's finding that an action is frivolous.[7] The trial court's decision is clearly erroneous if we are definitely and firmly convinced that it made a mistake.[8]

B. LEGAL STANDARDS

Generally, each party to an action pays its own attorney fees.[9] But exceptions exist.[10] The trial court may sanction a party for a frivolous action.[11] One way in which a claim is frivolous is when "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were true[.]"[12]

C. APPLYING THE STANDARDS

The Pastors contend that the trial court erred because the Pastors had a factual basis for their defense and many of their defenses had arguable legal merit. We conclude that the trial court did not clearly err when it found that the Pastors' defense of the action was frivolous in part.

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[7] *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

[8] *Id*. at 661-662.

[9] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

[10] *Id*.

[11] MCR 2.114(C), (F); MCL 600.2591.

[12] *Kitchen*, 465 Mich at 662; MCL 600.2591(3)(a)(*ii*).

Here, the Pastors consistently denied that they had failed to maintain the drain. They contended in part that "what Mr. Pastor has done is in full and complete satisfaction of any claims of the Plaintiff set forth in the complaint and prior orders of the Court . . . ." However, Pastor admitted that he put a cap on the intake of the drainage line one or two months before the lawsuit that he did not remove until October 2012. Regardless of Pastor's testimony that he believed that the drain was working, the trial court clearly found that John Pastor's testimony that he thought the line was working lacked credibility during the period of time for which John Pastor had capped it.

We are not definitely and firmly convinced that the trial court made a mistake when it found that the Pastors had no factual basis for part of their defense in this case. Because John Pastor knew that the drain was capped (and therefore not working), the Pastors had no factual basis for their defense that the Pastors had maintained the drain.

The Pastors also contend that they defended the case on a variety of bases that were not frivolous. We agree, but this does not mean that we need reverse the trial court's determination. The trial court's ruling recognized that the remainder of the Pastors' defenses were not frivolous. The trial court sanctioned John Pastor only for the time that the drain was capped, and it awarded the Herrs approximately half of their requested attorney fees. Therefore, even presuming that we conclude that the Pastors had a factual and legal basis to argue that the statute of limitations barred the claim or that the Herrs lacked standing, such a conclusion would not be contrary to the trial court's sanctions award.

V. CONCLUSION

We conclude that the Pastors waived their standing and statute of limitations defenses. We conclude that the trial court's finding that the Pastors failed to maintain the drain in compliance with the 2000 Order was not clearly erroneous. Finally, we conclude that the trial court did not clearly err when it found that the Pastors' defense of the action was partly frivolous.

We affirm. As the prevailing parties, the Herrs may tax costs.[13]

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray

[13] MCR 7.219.